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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE
SUPREME COURT OF THE UNITED STATES
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Florence County School District Four, Ernest K. Nicholson, Superintendent, in his official capacity, and School Board Members Bennie Anderson, Monroe Friday, Jack Odom, Elrita Bacote, T.R. Green, James W. Hicks, in their official capacities,

Petitioners,

v.

Shannon Carter, by and through her father and next friend, Emory Carter,

Respondents.

On Petition for a Writ of Certiorari to the The United States Court of Appeals for The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *TUCKER*

The Fourth Circuit in this case ordered a public school district to reimburse parents for a unilateral placement in a private school that fails to meet state educational standards. In so doing, it ignored the fact that the state's statutory obligation is to provide disabled students with a "free appropriate public education," which by definition must "meet the standards of the State Educational Agency." Individuals with Disabilities Act, 20 U.S.C. § 1401(a)(18)(B) (West 1988 & Supp. 1992) ("Act" or "IDEA"). Thus, respondents sought, and the Fourth Circuit conferred, relief beyond the scope of the Act. This judicial adventurism weakens state and local control over educational policy, and diverts necessary financial support from important public education programs to unqualified private education programs at a time when public authorities can least afford it.

This failure to adhere to the Act's explicit requirements is the thrust of the conflict between the Fourth and Second Circuits. In *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the Second Circuit recognized that the provision of a "free appropriate public education" -- which the state is obligated to provide as a condition of receiving federal funds under the Act -- is a prerequisite to any reimbursement for a private placement made on the unilateral initiative of the parents. Consequently, the court strictly applied the requirement that such placements must meet state educational standards if they are to be entitled to reimbursement at public expense. *Id.* at 568.

By contrast, the Fourth Circuit in this case jettisoned the standards requirement of § 1401(a)(18)(B) and upheld reimbursement for a long-term private placement that failed to meet the standards of the state educational agency.[1] In doing so, the court acknowledged its disagreement with *Tucker*, and in no way suggested that

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[1] Neither of the two prior cases cited by the court below as consistent with its position are nearly so sweeping in their reasoning or disruptive in their implications. In *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986), the court upheld the award of reimbursement for two temporary summer placements, where some such placement -- but not the one selected -- was required under the Act. The court ordered consideration of full or partial reimbursement, looking to such factors as the availability of more suitable alternative placements, the effort expended by the parents in identifying them, and the general cooperativeness of the public authorities.

In *Carrington v. Commissioner of Educ.*, 535 N.E. 2d. 212, 216 (Mass. 1989), the Massachusetts Supreme Court found reimbursement to be *permissible* under existing regulations, and only with regard to a temporary, interim placement while the parents were litigating an "individualized educational program" ("IEP"). As in *Alamo Heights*, the court remanded for consideration of whether reimbursement should be awarded for this interim period.

Both of these decisions involve claims for reimbursement for relatively short interim periods, where various constraints of time and other concerns may have influenced parental selection of a non-approved placement. Neither requires the conclusion -- and neither court stated, as did the Fourth Circuit here -- that parents are generally entitled to reimbursement for beneficial private school placements whether or not they meet the statutory requirements of a "free appropriate public education" which the statute imposes on the state and local agencies. Pet. App. 16a. Accordingly, the present decision calls for review by this Court in a way that the prior decisions did not.

the cases could somehow be reconciled on the basis of factual differences.[2]

Respondents' determined effort to distinguish this case from *Tucker* by highlighting the difference between New York and South Carolina procedures for approving private school placements under the Act misunderstands this fundamental disagreement between the two courts. The Act itself does not distinguish -- or even discuss -- any necessary criteria for implementing approval procedures. The IDEA's central requirement -- that the state guarantee to every child with disabilities a "free appropriate public education" -- applies whether or not the particular state compiles lists of approved schools as part of its administration of the IDEA. The Act does not render the state educational standards requirement inapplicable simply because the public education agency's approval process depends upon affirmative requests rather than the use of a list.

Nor does the application of the statute as written impose any unfairness on the Carters in the context of the South Carolina approval process. Mr. and Mrs. Carter could have advised the school district that they were opting for private placement, and then inquired as to whether Trident or other available schools met state educational standards. Instead, they chose to make their

[2] The Court of Appeals below noted "that courts have differed on the question presented here," and expressly chose to "decline to follow the *Tucker* decision." Pet. App. 15a-16a. In refusing to adopt the Second Circuit's conclusion (*Tucker*, 873 F.2d at 568) -- that "a parent may not obtain reimbursement for a unilateral placement" in unapproved private schools -- the Fourth Circuit did not limit the effects of its decision to South Carolina's particular approval process.

own unilateral decision without any such inquiry or any effort to cooperate further with the public authorities who they expected to pay the bill. Such autonomy in parental selection of a publicly-funded, private education is fundamentally at odds with the approach of the IDEA, which is designed to foster interaction and cooperation between parents and school authorities. *See Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) (noting Congress's emphasis upon full participation of all concerned parties throughout the development of the IEP); *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985) (parents and school officials must work together in a "cooperative approach").

Respondents' effort to depict Trident as an appropriate education by other standards is also irrelevant to the circuit conflict at issue here. The decision below explicitly acknowledges that Trident Academy does not meet state educational standards for teacher certification, Pet. App. 11a-12a, and holds categorically that state educational standards need not be met where the publicly funded, private education is selected unilaterally by the parents. Pet. App. 16a-17a. Whatever may be the merits of Trident, including its ability to elicit private accreditation from the Southern Association of Colleges and Schools, Opp. Br. 15, the Fourth Circuit decision stands four-square for the proposition that where a single public school placement is found inappropriate, parents need not feel constrained by state educational requirements in selecting a private school alternative.[3]

[3] Respondents note the court of appeals' observation that previously three students have been referred to Trident by South Carolina

Respondents seek to justify this conclusion, as did the Fourth Circuit, Pet. App. 16a, by relying on a separate section of the Act that speaks to the elements of a state plan, but not to the definition of a "free appropriate public education." *See* § 1413(a)(4)(B). Opp. Br. at 16-18. In stating what must be spelled out in the plan, this section does not purport, and cannot fairly be read, to alter the fundamental obligation that the statute imposes on states: to guarantee to all children a "free appropriate public education." Nor does it suggest that certain elements of the required "free appropriate public education" as set forth in § 1401(a)(18) are waived in the comparatively rare case of a unilateral private placement by the parents.

On the contrary, § 1413(a)(4)(B) simply says that state plans required under the Act must specifically address how state standards will be met in connection with the relatively frequent state agency referrals to private educational providers. The section does not require the plan to address how state standards will be realized with regard to unilateral private referrals, perhaps because the drafters did not envision such actions: The statute was designed to promote school and parental cooperation in the provision of an appropriate public education, not to encourage unilateral parental decisionmaking. There is certainly no inference to be drawn from that omission that

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public schools. Opp. Br. 15; Pet. App. 5a-6a. The record contains no information on when these referrals occurred and whether Trident met state educational standards at that time. In no way does the fact of prior placements under undefined circumstances qualify the court of appeal's statements that at the times relevant to this case, Trident did "not attempt to comply with the terms of the Act," either in the certification of its teachers or with regard to the Act's IEP requirements. Pet. App. 11a.

the statute imposes funding obligations on states going far beyond the free appropriate public education required in the statute.

Nor does respondents' contention that two of the four requirements of § 1401(a)(18) can never be met in the private school context support the Fourth Circuit's judicial revision of the statute. Opp. Br. 28. To the contrary, it appears that those standards can in fact be satisfied in public and private schools alike. First, the "public supervision" requirement in § 1401(a)(18)(A) may be met if states are permitted to enforce their standards in the private school context.

Second, public agency participation in the IEP procedures required by § 1401(a)(18)(D) can be implemented even where parents have unilaterally placed the child in a private school setting. No reason has been given and none appears that necessarily forecloses public school officials from continuing to assist in planning the private program of education that is to be funded at public expense. If for some reason public agency participation is not possible in a particular case, the IEP process outlined in the statute can still go forward through meetings between the parents and the private school officials. In all events, Mr. and Mrs. Carter and Trident made no effort to involve the education officials or to follow any of the IEP procedures mandated under the Act. Pet. App. 11a.

In sum, there is a clear conflict, recognized by the Fourth Circuit itself, between the decision below and that of the Second Circuit in *Tucker*. As evidenced by the three amicus briefs offered in support of the petition by

representatives of public educational agencies,[4] it is a disagreement of far more than academic interest. By enforcing an obligation of reimbursement for a private school placement unilaterally selected by the parents, even though it does not meet state educational requirements or otherwise meet the definition of a "free appropriate public education," the court below has created a state funding obligation that has no basis in the language of the IDEA. The statute as rewritten by the Fourth Circuit greatly increases the financial burden on public agencies and decreases their control over educational policy and curriculum. For all of these reasons, plenary review by this Court should be granted.

II. THE DECISION BELOW ESTABLISHES A SERIOUSLY MISLEADING PRECEDENT BY REJECTING AN IEP BASED SOLELY ON GOALS THAT WERE LIMITED AT THE PARENTS' REQUEST

Respondents concede that the decision below focused "on the limited annual goals of the proposed IEP in assessing its appropriateness." Opp. Br. 13. Given that this narrow inquiry is fundamentally at odds with the essential question posited by *Rowley*, 458 U.S. at 206-07 -- whether the program is "reasonably calculated" to confer educational benefits upon the child -- this Court's review is warranted.

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[4] *See* Brief of the States of Louisiana, Maryland, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and Wyoming as Amici Curiae in Support of Petitioners; Brief of the National Association of State Boards of Education as Amicus Curiae in Support of Petitioners; and Brief of the National School Boards Association as Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondents seek to avoid that result by reciting the facts of this case at great length, *i.e.*, the details of Shannon's learning disability and how the IEP agreed upon was inappropriate to meet her needs. Yet the Fourth Circuit relied exclusively on the limited program goals in judging the program and ignored the substantive adequacy of the program itself.

The benefits Shannon received during the period the IEP was in effect were evident (JA 149, 263, 269, 271, 292-293) -- respondents assert only that other factors played a role in her progress. Yet to conform to the dictates of *Rowley*, it is this progress that must be considered. The Fourth Circuit ignored Shannon's progress -- indeed ignored the substance of the IEP entirely -- and focused instead on limited goals that were kept low at the request of the Carters' own advisor.

This highly skeptical approach to review of public agency placements under the IDEA is seriously at odds with the approach taken by this Court in *Rowley*. There, this Court viewed the statute as creating a "basic floor of opportunity," while leaving to the states the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . ." 458 U.S. at 201, 207. Because the decision below can be expected to mislead other courts in performance of the oft-recurring judicial task of reviewing IEPs, certiorari should be granted on this issue.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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